

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: April 3, 1996

TO: John D. Nelson, Regional Director, Region 19

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Cineplex Odeon d/b/a/ Plitt Theatres, Case 19-CA-24176

530-6050-012, 530-6050-0140, 530-6050-0800, 530-6050-0875, 775-8700, 775-8780, 775-8799

This case was submitted for advice regarding whether the Employer's insistence to impasse on a contract proposal authorizing it to reassign all unit work to statutory supervisors who could not be represented by the Union constitutes a permissive subject of bargaining.

FACTS

Cineplex Odeon Corp., d/b/a/ Plitt Theatres ("Employer"), operates movie theaters in Tacoma and Seattle, Washington.

The International Alliance of Theatrical Stage Employees ("Union") represents the moving picture machine operators ("projectionists") at the Employer's Tacoma and Seattle locations. The Tacoma projectionists were represented by Local 175 of the Union until July 1, 1995, when Local 175 merged into Local 154 of the Union, which represents the Employer's Seattle employees.⁽¹⁾ The last collective-bargaining agreement between the Employer and Local 175, which was extended twice without modification, expired in September, 1994. However, the terms of the expired Local 175 contract are still being applied to Local 175 members.⁽²⁾

The union-security clause contained in Section I(A) of the Local 175 contract indicates that the Union represents employees in only one job classification: "The Employer recognizes the Union as the exclusive bargaining representative of all moving picture machine operators." ["Moving picture machine operators" are hereinafter referred to as "projectionists."]

Under two alternative provisions of the Local 175 contract, the Employer may reassign certain projectionist duties to management personnel. The first alternative guarantees each Union projectionist a minimum of 33 hours of work each week, and provides that "[t]he company agrees to give the Union the names of management personnel authorized to operate the projection equipment under the terms of this Agreement."⁽³⁾ Section VIII(B)-(E). The second alternative for reassignment of projectionist work guarantees Union projectionists a minimum of 35 hours per week, but allows the Employer to schedule those hours during peak and weekend hours.⁽⁴⁾ Section VIII(H). Under this provision, the Employer is authorized to reassign additional projectionist work to other personnel, including management personnel who are expressly excluded from coverage under the Local 175 contract.

The Employer may assign other theatre personnel to operate the projection booth at any time during operating hours; however, the regular projectionist will receive no less work than the 35 hours called for in sub-section 1 above. Other theatre personnel shall not be covered by this Agreement and their wages shall be determined by management.

Section VIII(H)(4) (emphasis added).

In practice, for the last ten years the Employer has reassigned projectionist duties exclusively to its managers and assistant managers, some of whom are salaried and other of whom are paid on an hourly basis. Both the Union and the Employer contend, and the Region has found, that currently these management personnel are statutory supervisors under the Act.

Between June, 1995 and November, 1995, the Union and Employer held several negotiating sessions relating to the Local 175 contract. The Employer proposed to immediately eliminate all the Union projectionists in the Tacoma area and have their duties assumed by the theater managers and assistant managers who currently perform projectionist duties when a Union projectionist is not on duty. According to the Employer, due to technological innovation one projectionist can now operate up to eight screens at one time, allowing management personnel to perform the projectionist job along with their other duties and eliminating the need for full time Union projectionists.

The Union, while disputing that any technological changes have occurred in the industry, responded with proposals to maintain some Union projectionists by altering the number, wages, and minimum hours of Union projectionists. Instead, the Union proposed to reduce the minimum hours to 30 hours per week, eliminate one projectionist position, and to increase projectionist pay and benefits. ⁽⁵⁾

In response to the Union's proposal to preserve some Union projectionist jobs, the Employer proposed to negotiate an "interim agreement." The Employer intended the "interim agreement" to contain concessions to the existing Local 175 contract. To this end, the Employer made several proposals to eliminate the Union projectionists over time, rather than immediately. ⁽⁶⁾ The Union, however, interpreted the Employer's proposal as an offer to roll over the existing contract without any substantive changes. ⁽⁷⁾

At a negotiating session dated October 10, 1995, the Union made a final proposal for a two year contract that would preserve two Union projectionists. ⁽⁸⁾ The Employer declared that its proposal to immediately eliminate one projectionist position and lay off all remaining Union projectionists after 9 months, with severance pay was its best and final offer, ⁽⁹⁾ and that the parties were at an impasse. ⁽¹⁰⁾ On November 1, 1995, the Union informed the Employer by letter that it was ready to continue negotiations, and provided dates that it would be available.

ACTION

We conclude that the Employer violated Section 8(a)(5) by insisting to impasse that the Union agree to its proposal to reassign all unit work to statutory supervisors, where the proposed clause also provided that the employees to whom the work would be reassigned would not be covered by the collective-bargaining agreement. Such a demand constitutes a permissive bargaining subject because it contemplates that the Union would waive its right to represent those employees.

A. Reassignment Of Unit Work Constitutes A Mandatory Subject of Bargaining

Section 8(d) of the Act defines collective bargaining as "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." As a consequence, wages, hours, and other terms and conditions of employment are mandatory subjects of bargaining, although neither party is legally obligated to yield or reach agreement. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 209 (1964) (citations omitted). All other subjects are permissive, over which parties may bargain if they so choose but cannot reach impasse. *Antelope Valley Press*, 311 NLRB 459, 460 (1993).

The assignment of unit work outside the bargaining unit is an example of a mandatory subject of bargaining, which can be bargained to impasse, because it directly affects the bargaining unit's terms and conditions of employment by reducing the amount of bargaining unit work. *Antelope Valley*, 311 NLRB at 460; *Bridgeport and Port Jefferson Steamboat Co.*, 313 NLRB 542, 545 (1993); *Hill-Rom Co., Inc.*, 297 NLRB 351, 358 (1989), enf. denied on other grounds, 957 F.2d 454 (7th Cir. 1992); *Crown Coach Corp.*, 155 NLRB 625, 628 (1965). As the Board explained in *Storer Cable TV of Texas, Inc.*, 295 NLRB 295, 296 (1989), requiring bargaining over the transfer of unit work allows a union to prevent or minimize the loss of unit work by offering alternatives such as wage reductions or increased job duties. ⁽¹¹⁾

1. Insistence to Impasse on the Reassignment of All Unit Work Is Lawful

The Board has held that reassignment of work remains a mandatory subject of bargaining, even when unit work is assigned to

statutory supervisors. ⁽¹²⁾ Likewise, a proposal to assign unit work to former unit employees that were promoted to, or reclassified as, statutory supervisors is a mandatory subject of bargaining. ⁽¹³⁾

2. Insistence to Impasse on the Reassignment of Unit Work to Statutory Supervisors is Lawful

Similarly, a proposal to reassign work remains a mandatory subject of bargaining even when the work of the entire bargaining unit will be reassigned. In *Batavia Newspapers Corp.*, 311 NLRB 477, 480 (1993), the Board rejected an argument that a proposal allowing the employer sole discretion to reassign work out of the bargaining unit was rendered a permissive subject of bargaining because it could potentially eliminate all unit work. Relying on subcontracting cases which rejected the identical argument, ⁽¹⁴⁾ the Board held that a proposal to reassign unit work, even all the unit's work, affected only what work the unit employees performed -- not who the union represented. As a consequence, the employer's reassignment proposal was held to be a mandatory subject of bargaining. See also *Hill-Rom*, 297 NLRB at 358 (transfer of work outside bargaining unit is mandatory subject of bargaining, which is "not negated by a showing that upon such a transfer, a job classification within the unit will have no incumbents and, therefore, will be dormant at best").

Here, the Employer's proposal was to reassign unit projectionist work to management personnel. Such a proposal is a mandatory subject of bargaining because it affects the bargaining unit's terms and conditions of employment. *Antelope Valley*, 311 NLRB at 460; *Storer*, 295 NLRB at 296; *Crown Coach*, 155 NLRB at 628. Since the Union must be consulted concerning the bargaining unit's loss of work, see *Bridgeport*, 313 NLRB at 545, *Storer*, 295 NLRB at 296, it is legally irrelevant to whom the work is transferred -- in this case to statutory supervisors excluded from the coverage of the Act. Similarly, it is legally irrelevant that all of the work of the bargaining unit may be reassigned where, as here, the only change is the identity of the persons performing the work -- not the jobs or employees the Union represents. See *Batavia*, 311 NLRB at 480. As a consequence, the Employer could lawfully insist to impasse that it be able to reassign all Union projectionist work to managers who are statutory supervisors.

B. Insistence To Impasse On The Union's Waiver Of Its Statutory Right To Represent Employees To Whom Unit Work Is Reassigned Is Unlawful

However, the Employer violated 8(a)(5) when it insisted to impasse that the Union agree to waive its right to represent the management personnel to whom the Union projectionist work is to be assigned.

A union may agree to waive a statutory right, including the right to representation, so long as it is done in a clear and unmistakable manner. ⁽¹⁵⁾ However, an employer may not insist to impasse that a union waive its statutory right to represent employees.

In *Greensburg Coca-Cola Bottling Co.*, 311 NLRB 1022 (1993), enf. denied, 40 F.3d 669 (3d Cir. 1994), an employer proposed to impasse that the terms and conditions of part-time employees be determined exclusively by management, rather than by the collective-bargaining agreement, where the employer controlled the number of hours an employee worked. It then locked out employees in support of this proposal. *Id.* at 1023. The Board held that the employer's intent was to unilaterally control which employees were in the bargaining unit. By conditioning the union's agreement on its proposal, the employer was found to have attempted to compel a change in unit scope, which is a permissive subject of bargaining. ⁽¹⁶⁾ *Id.* at 1023-24.

Similarly, in *Bremerton Sun Publishing Co.*, 311 NLRB 467 (1993), the employer insisted to impasse on a proposal allowing it to reassign work to non-unit employees, and to delete a description of the unit as any employee performing unit work, which would allow the employer to unilaterally determine who is in the unit. The Board, finding a violation of Section 8(a)(5), held that an employer may not "insist that nonunit employees to whom the work is transferred will remain outside the unit," as the appropriate unit determination is a matter for the Board upon the filing of an unfair labor practice or a unit clarification petition. *Id.* at 470-71.

This principle was reaffirmed by language contained in *Antelope Valley*. ⁽¹⁷⁾ There, the employer's proposal to transfer work outside the bargaining unit was held to be mandatory where it did not alter the unit description clause and "did not attempt to deny the Union the right to assert that any individuals to whom unit work might be assigned were unit members. . . ." 311

NLRB at 462.

The rationale behind the requirement that both parties voluntarily agree to any changes in the scope of a bargaining unit is that under Section 7 employees are entitled to bargain collectively through the representative of their own choosing, and they cannot bargain meaningfully unless they know the unit of bargaining. *Douds v. International Longshoremen's Ass'n*, 241 F.2d 278, 281 (2d Cir. 1957).⁽¹⁸⁾ Moreover, by statute the Board is charged with determining the proper bargaining unit, subject to the petitions of the parties. *Id.* at 282.

The Employer here insisted to impasse on a proposal that prohibits the Union from representing the employees to whom the Union projectionist work is being reassigned. The Employer's last and final proposal (like all the parties' proposals) assumes the continuation, in relevant part, of the expired Local 175 collective-bargaining agreement.⁽¹⁹⁾ That agreement contains a clause allowing the Employer to reassign work to management personnel, yet expressly excludes those employees from coverage under the collective-bargaining agreement. Hence, the clause excludes the management personnel from Union representation -- even if they at some point become statutory employees. This is precisely the type of proposal that was found to violate Section 8(a)(5) in *Greenburg Coca-Cola and Bremerton Sun*. The Employer's reassignment proposal goes beyond a mere transfer of work out of the unit, and instead seeks to unilaterally limit the employees the Union may represent. The Employer could lawfully propose and bargain over such a proposal, but could not insist to impasse that the Union agree to it.

For these reasons, the Region should issue a complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by insisting to impasse on a contract proposal authorizing it to reassign all unit work to statutory supervisors where the clause also would constitute a waiver of the Union's statutory right to represent the employees to whom the work was to be reassigned.

B.J.K

¹ The Union contends that the merger took place, in part, to satisfy the Employer's concerns about employee representation and to address Employer complaints about the behavior of certain Union projectionists.

² The collective-bargaining agreement between the Employer and Local 154 expires May 1, 1996.

³ In 1995, for example, the Employer requested that Union projectionists train numerous theater management personnel to perform projectionist duties.

⁴ The Region finds that the Employer rarely elects the alternate operations policy contained in subpart (H) of Section VIII because it is more costly.

⁵ Later, on September 20, 1995, the Union proposed to create a new utility maintenance position, eliminate three projectionists, increase the minimum hours to 40 hours per week, and increase pay over a two year contract.

⁶ On September 20, 1995 the Employer proposed to eliminate one projectionist, to reduce by 50 percent the minimum hours of the remaining projectionists for six months at which time their positions would be eliminated and they would receive severance pay, and for service work to be performed by non-unit personnel.

⁷ In its June 20, 1995 letter the Employer proposed that the parties "do an interim agreement, where the Tacoma agreement would terminate as of May, 1996 so that the Seattle and Tacoma locals could be negotiated together." During a negotiating session on September 6, 1995, the Union accepted the Employer's offer of an interim agreement, believing it to mean that the parties would roll over the existing Tacoma contract. However, the Employer said that it intended that an interim Tacoma contract would incorporate concessions, to which the Union complained of bad faith bargaining. This complaint is included in the charge filed by the Union, but is not part of the Region's request for advice.

⁸ The Union proposal would also increase their minimum hours to 40 hours per week, increase their pay, and provide severance pay to projectionists who are eliminated.

⁹ The Employer's final proposal, which it reiterated on October 16, 1995, and confirmed by letters dated October 2 and 16, 1995, was to eliminate one projectionist position immediately, while the remaining projectionists would have their minimum hours reduced 50 percent for six months, then another 50 percent reduction for three more months, at which time their jobs would be eliminated and they would receive severance pay. The Union membership rejected this offer in October, 1995.

¹⁰ The Region does not question, and did not seek advice as to whether, a valid impasse was reached.

¹¹ Storer is a subcontracting case which is often cited by Board decisions involving the reassignment of bargaining unit work to non-unit employees of the Employer. See, e.g., Park Manor Nursing Home, Inc., 312 NLRB 763, 768 (1993) (likening employer proposal to reassign unit work to supervisors and other non-unit personnel to subcontracting proposal); Batavia Newspapers Corp., 311 NLRB 477, 480 (1993) (relying on Storer for the proposition that the elimination of unit work through reassignment did not affect unit scope).

¹² See, e.g., Park Manor Nursing Home, 312 NLRB at 767 (employer proposal to reassign work to supervisors and other non-unit personnel a mandatory bargaining subject). Cf., Crown Coach Corp., 155 NLRB at 628 (union proposal to prohibit foremen and supervisors from performing unit work a mandatory subject of bargaining).

¹³ See, e.g., Hampton House, 317 NLRB 1005, 1005 (1995) (promotion of LPN nurses to supervisors not subject to negotiation, but employer must bargain with union regarding nurse supervisors' continued performance of unit work); Bridgeport, 313 NLRB at 545 (employer required to bargain to impasse with unit regarding loss of unit work performed by captains, mates, and chief engineers who were reclassified as statutory supervisors).

¹⁴ In Batavia, 311 NLRB at 480 n.8, the Board cited to Fibreboard, which held that an employer's proposal to contract out all unit work, eliminating the work of all bargaining unit employees, constituted a mandatory subject of bargaining. The Board also relied on Storer, in which the employer's proposal to subcontract unit work was held to be a mandatory bargaining subject even though it "might well significantly diminish or eliminate the bargaining unit." Batavia, 311 NLRB at 490.

¹⁵ Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 705 (1983) (holding union did not waive no-strike clause despite prior arbitration decisions relating to clause); Mohenis Services, Inc., 308 NLRB 326, 333 (1992) (finding union did not waive right to represent employees at other facilities); Allentown Mack Sales, 316 NLRB 1199 (1995) (agreement to terminate contract held not a commensurate waiver by union of right to represent employees).

¹⁶ The Third Circuit, however, found on appeal that the employer's final proposal had not incorporated the proposal to exclude part-time employees from the coverage of the contract, and that in any event the employer was merely insisting on its interpretation of the existing contract based on prior application.

¹⁷ Although the analytical framework of Antelope Valley is consistent with Greensburg Coca-Cola and Bremerton, its precise holding represents an accommodation for a unique circumstance present in the newspaper publishing industry: where the unit jurisdictional clause described unit work in terms of work assignments, rather than job classifications. In Antelope Valley the Board held that an employer could insist to impasse on a proposal to reassign unit work, even though the proposal would seem to alter the scope of the bargaining unit. The Board expressly noted that to hold otherwise would forever bar the employer from taking advantage of changing technology. 311 NLRB at 461. Here, by contrast, unit work is defined as one job classification, projectionist, so there is no need to rely on Antelope Valley's holding.

¹⁸ In Douds, the union insisted on bargaining on behalf of employees outside of Board determined unit, in violation of Section 8(b)(3)).

¹⁹ The presumption that the Employer's final proposal was intended to amend the expired Local 175 contract is based on the following: (a) The Employer's final proposal did not contain the material employment terms for Union projectionists (such as hours of work, wages, or benefits), as were contained in the expired agreement and would be necessary for the nine months Union projectionists would be employed; and (b) The Employer desired an "interim" concessionary agreement based on the expired Local 175 contract.